

Claimant alleges she injured her left shoulder, arm and neck on April 18, 2002, when she was lifting and pulling a box onto a conveyor belt. On that date, claimant was working for respondent in her job as a material handler or “picker.” Her job required that

she fill orders by locating the product, putting the product into a box and “When the box is full, we tape it up and we write on it and we push it off onto a line a conveyor belt.”<sup>1</sup>

Claimant testified that on October 18, 2002, she “. . . was finishing up my order and I was - - had taped up the top of the box and I had flipped it over to tape the bottom of the box and flipped it back over to the top and pushed it off on the line when I had felt a pain in my neck and shoulder.”<sup>2</sup> Claimant did not report this incident to her employer that day because “I didn’t think much of it. I thought that it was something that would go away.”<sup>3</sup> Claimant was able to finish her workday. The next day, Friday, claimant was not scheduled to work. Claimant’s pain worsened and on Saturday, April 20, claimant went to the hospital emergency room.

The emergency room records contain a history of an onset of pain “yesterday a.m.” and reflect that claimant denied an injury. Claimant explained that she told the emergency room staff about the incident at work on Thursday, but said that the pain was not bad until Friday morning. When asked if she had an accident, claimant took that to mean did she injure herself at home Friday morning, to which she answered, no. Claimant denied lifting anything heavy or doing anything at home on Friday or Saturday to cause her symptoms. In addition, claimant denies ever having any problems in her neck and shoulder area before April 18, 2002.

Claimant’s next scheduled workday was Monday, April 22. Claimant did not report to work that day. Instead she called in and left a message that she would not be in that day. Claimant said she went to work the following day, Tuesday, April 23, and reported her injury to her supervisor and completed an accident report.

Claimant was sent by her employer to Mr. Bryan Van Meter, a physician’s assistant at the Geary Community Occupational Health Clinic. She told Mr. Van Meter that her pain started on April 18 when she was pushing a box on a conveyor. Mr. Van Meter told claimant that he did not believe she could have injured herself pushing a box weighing 30 pounds.

At the suggestion of the company nurse, claimant completed paperwork for Family Medical Leave Act (FLMA) benefits. She was told that this would cover her being off work in the event that her workers compensation claim was denied. Eventually, claimant was

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<sup>1</sup> P.H. Trans. at 8.

<sup>2</sup> P.H. Trans. at 8.

<sup>3</sup> P.H. Trans. at 8-9.

informed that her workers compensation claim was being denied by the respondent and its insurance carrier. The preliminary hearing followed as a result of that denial.

Claimant testified that she filled out the FMLA forms so that the days she missed work would not be treated as “occurrences” which would then result in her being terminated.<sup>4</sup> In filling out the FMLA forms claimant did not intend to imply that her injury was not work-related. In fact, claimant said she kept telling the nurse, Becky Patton, that her injury was work-related.

One of claimant’s supervisors, Mitchell Benton, testified that when he spoke with claimant on Tuesday, April 23, claimant said she felt something in her neck when she was changing clothes over the weekend. The next day, after claimant had spoken with the nurse, Mr. Benton spoke with claimant again. According to Mr. Benton, claimant asked him if she could be fired for getting hurt off the job and having to take time off. Mr. Benton said no, and said that there were different avenues she could take including FMLA leave or short term disability. Mr. Benton said he was not aware of claimant having filed an accident report on April 23 for a work-related injury.

Becky Patton is the health care coordinator for respondent. Ms. Patton clarified that she is a certified nurses’s assistant, not a registered nurse or a licensed practical nurse. Her primary responsibilities involve processing workers compensation, FMLA and short-term disability claims. Ms. Patton stated that she received a called from Mr. Benton that claimant needed to see her about applying for FMLA or short-term disability on April 23. Ms. Patton denies that claimant reported a work-related injury nor did claimant complete any paperwork that day. She said it was the following day claimant returned and completed the paperwork for FMLA leave. According to Ms. Patton claimant said that she was injured when she was changing clothes on Saturday morning. Ms. Patton explained that once the FMLA leave runs out each day the employee misses work after that it’s treated as an unexcused absence. Eight such occurrences result in termination. The first time claimant told her that the injury was work-related was Friday, the 26<sup>th</sup> of April. It was then that a accident report was filled out.

Although Mr. Benton had memos he had written himself that corroborated his testimony, and Ms. Patton had documents in the file she maintained on claimant that corroborated portions of her testimony, there were also documents discovered in that file that contradicted their testimonies.<sup>5</sup> Ms. Patton testified that the first time claimant

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<sup>4</sup> P.H. Trans. at 16.

<sup>5</sup> Although claimant’s counsel had made a discovery request for documents, they were not produced before the preliminary hearing, nor were they produced before Ms. Patton testified. Mr. Benton’s memos were admitted into evidence by the ALJ over claimant’s timely objection. The ALJ’s ruling on that objection was not

reported her injury was work-related was on April 26. Ms. Patton specifically denied that claimant described her injury as work-related on April 23. However, there was a report of accident in her file dated April 23, 2002.<sup>6</sup> After considerable prompting with leading questions from respondent's counsel, Ms. Patton was finally able to explain that the April 23 date represented the first date that claimant reported an injury, not the first date she reported a work-related injury. This explanation, however, contradicted her earlier testimony. Furthermore, although Ms. Patton testified that she did not send claimant to the Geary Community Occupational Health Clinic doctor until after claimant reported the work-related injury on April 26, the clinic's records show that claimant was seen on April 25. Ms. Patton admitted that claimant could not have gone on her own and be seen by the company physician at the Geary Community Occupational Health Clinic because only Ms. Patton can call and make the appointments for workers' compensation related treatment.

In addition, the respondent's file contained notes that indicated claimant called in on Monday [April 22] and reported that her shoulder was hurting from "last Thursday." Cezanne Korbel, the company nurse, said that she made those notes on April 26 after she was advised of claimant's work-related injury by Ms. Patton. Ms. Korbel said she didn't have any conversations directly with claimant before that date. This explanation would seemingly eliminate the possibility of the notes being from the recorded message claimant left when she called in her absence on Monday, April 22.

Finally, claimant was examined at her attorney's request by orthopedic surgeon, Sergio Delgado, M.D., who opined claimant's testimony concerning her mechanism of injury was consistent with the injury he observed upon examination. This opinion by a board certified orthopedic surgeon contradicts the contrary opinion of the company doctor's physician assistant, Mr. Van Meter.

Obviously, the testimony is conflicting. However, claimant's description of the sequence of events is supported by the fact that claimant was seen by respondent's company physician on April 25. That was a day before the date respondent alleges claimant first reported her injury as work-related. Respondent's witness admits that claimant could not have seen the company physician on her own and that Ms. Patton made the appointment at the Geary Community Occupational Health Clinic for claimant. Respondent's alleged chronology of events is, therefore, refuted by the fact that claimant saw the company doctor on April 25. Accordingly, the Appeals Board accepts claimant's testimony over that of respondent's witnesses and in particular that of Ms. Patton. The

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raised as an issue on appeal by claimant. In fact, claimant's counsel makes reference to those documents in the letter brief to the Appeals Board.

<sup>6</sup> P.H. Trans., Cl. Ex. 3.

Appeals Board finds claimant suffered a work-related injury on April 18, 2002 as alleged.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated August 15, 2002, entered by Administrative Law Judge Bryce D. Benedict, should be and is hereby, reversed and this matter remanded to the Administrative Law Judge for further orders consistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2002.

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Michael J. Haight, Attorney for Respondent and Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge  
Director, Division of Workers Compensation